

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0572

MALLISIA M. PALMER

Claimant-Petitioner

V.

HUNTINGTON INGALLS INDUSTRIES,
INCORPORATED

Self-Insured

Employer-Respondent

DATE ISSUED: 01/10/2019

DECISION and ORDER

Appeal of the Order Not Approving Lay Representative on Remand of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM

Claimant appeals the Order Not Approving Lay Representative on Remand (2018-LHC-00109, 2018-LHC-00110) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We will review the administrative law judge's Order for abuse of discretion and compliance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

This is the second time this case is before the Board. As the relevant procedural history and law in this case are not in dispute, we incorporate our prior discussion and restate only the most relevant facts herein. *See Palmer v. Huntington Ingalls Industries, Inc.*, BRB No. 18-0203 (July 12, 2018).

Claimant has been receiving ongoing permanent partial disability benefits for injuries she suffered while working for employer in 1993. 33 U.S.C. §908(c)(21). On September 28, 2017, Lamarr Brown, a lay representative, requested a hearing on behalf of claimant, asserting that there has been a change in claimant's condition and that she is now entitled to permanent total disability benefits. *See* 33 U.S.C. §§908(a), 922. On November 10, 2017, Mr. Brown requested the administrative law judge's approval to serve as claimant's lay representative in the proceedings before the Office of Administrative Law Judges (OALJ). By Order issued on November 29, 2017, the administrative law judge denied Mr. Brown's request, summarily stating that he "has not demonstrated sufficient knowledge and qualifications to represent the Claimant" in the OALJ proceedings under the Act. Order at 2 (Nov. 29, 2017). Pursuant to claimant's interlocutory appeal, the Board vacated the administrative law judge's disqualification of Mr. Brown because the administrative law judge did not explain the basis of her decision in accordance with the Administrative Procedure Act, 5 U.S.C. §557(C)(3)(A) (the APA). The Board directed the administrative law judge, on remand, to reconsider Mr. Brown's request, and if she again finds that he has not established the qualifications reasonably necessary to represent claimant, to explain her finding in accordance with the APA. *Palmer*, slip op. at 4-5.

On August 3, 2018, the administrative law judge issued her Order on Remand, in which she again denied Mr. Brown's request to represent claimant before the OALJ. She explained she based her disqualification of Mr. Brown on the quality of his representation of the claimant in *Sawyer v. CP&O, LLC*, Case No. 2014-LHC-00290 (June 17, 2015);¹ and his demonstrated lack of knowledge of the law in *Ricks v. CP&O, LLC*, Case No. 2017-LHC-01364 (decision not yet issued);² *Copeland v. Ceres Marine Terminals, Inc.*, 2017-

¹ With respect to *Sawyer*, the administrative law judge stated that Mr. Brown: did not timely file his pre-hearing statement or exchange exhibits with the employer; did not comply with subpoena request requirements and resubmitted the same requests that had been denied, as improper, by the judge; argued issues that had been dismissed by the judge; and, attempted to testify as a fact witness.

² With respect to *Ricks*, the administrative law judge stated Mr. Brown demonstrated ignorance regarding when to file a timely claim. Mr. Brown appealed the administrative law judge's disqualification of him as claimant's lay representative in *Ricks*. The Board decided the interlocutory appeal and remanded the case for the administrative law judge to

LHC-01657 (Dec. 29, 2017),³ and *Joyner v. Ceres Marine Terminals, Inc.*, 2018-LHC-00923 (decision not yet issued),⁴ cases that are contemporaneous with this one and in which the administrative law judge denied Mr. Brown's request to represent the claimants.

On August 23, 2018, claimant, with the aid of her lay representative Mr. Brown, appealed the administrative law judge's Order on Remand disapproving Mr. Brown's request to serve as her representative.⁵ Claimant asserts that her former counsel denied her effective assistance because of her race.⁶ Employer responds to claimant's appeal, contending the administrative law judge properly denied Mr. Brown's request.

Claimant's appeal is of a non-final, or interlocutory, order, which does not satisfy the three-prong test for appealability. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (collateral order doctrine). Nonetheless, we will entertain claimant's appeal to direct the course of the adjudicatory process. *See e.g., Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23

explain the basis for the disqualification. *Ricks v. CP&O, LLC*, BRB No. 18-0202 (July 18, 2018).

³ With respect to *Copeland*, the administrative law judge stated Mr. Brown demonstrated ignorance regarding the statutes of limitations for filing claims and requests for modification. On appeal, the Board affirmed the denial of benefits on the ground that the claimant's petition for modification was untimely filed, explicitly rejecting Mr. Brown's assertion that the one-year statute of limitations for filing a modification request does not apply to an administrative law judge's authority to modify awards. *Copeland v. Ceres Marine Terminals*, BRB No. 18-0188, slip op. at 5 (Sept. 13, 2018) (motion for reconsideration pending). The Board did not reach the issue of Mr. Brown's disqualification.

⁴ In *Joyner*, the administrative law judge found Mr. Brown demonstrated a lack of knowledge concerning applicable discovery rules, including discovery deadlines, a party's obligation to timely respond to interrogatories and requests for documents, and the requirement to supplement incomplete discovery responses. The Board affirmed the administrative law judge's disqualification of Mr. Brown. *Joyner v. Ceres Marine Terminals, Inc.*, BRB No. 18-0530 (Dec. 20, 2018).

⁵ The Board previously granted Mr. Brown's request to represent claimant in proceedings before the Board. *Palmer*, slip op. at 3 n.2.

⁶ Claimant's brief does not address the administrative law judge's stated reasons for finding Mr. Brown insufficiently qualified to represent claimant.

BRBS 80 (1989). We review an administrative law judge's procedural orders for an abuse of discretion and compliance with law. *See generally* *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995); *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Upon consideration of the administrative law judge's findings and the contentions raised on appeal, we find no reversible error in the administrative law judge's decision to deny Mr. Brown's request to serve as claimant's lay representative. Pursuant to Section 18.22(b)(2) of the Rules of Practice and Procedure for the Office of Administrative Law Judges, the administrative law judge may require a lay representative to establish sufficient knowledge and ability to render appropriate assistance. 29 C.F.R. §18.22(b)(2). The administrative law judge is afforded broad discretion in the conduct of pre-hearing matters and may deny a person's request to serve as a lay representative. 29 C.F.R. §§18.12, 18.22(b)(2), 18.43; *see also* 5 U.S.C. §554 *et seq.*; *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Although Mr. Brown declared his knowledge and familiarity with applicable law, rules, and regulations, the administrative law judge permissibly found he lacks sufficient knowledge as demonstrated by his pleadings and conduct in other cases. *See Joyner v. Ceres Marine Terminals, Inc.*, BRB No. 18-0530, slip op. at 6 (Dec. 20, 2018); *Copeland v. Ceres Marine Terminals*, BRB No. 18-0188, slip op. at 5 (Sept. 13, 2018) (motion for reconsideration pending). As the administrative law judge rationally explained her bases for finding Mr. Brown unable to render appropriate assistance in this case, and as claimant's brief does not address these findings, claimant has not established the administrative law judge abused her discretion in this matter. *See generally* *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Consequently, we affirm the administrative law judge's denial of Mr. Brown's request to serve as a lay representative for claimant in this case.

Accordingly, the administrative law judge's Order Not Approving Lay Representative on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge